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Preliminary report on the immunity of State officials from foreign criminal jurisdiction

Prepared by Ms. Concepción Escobar Hernández, Special Rapporteur

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I. Introduction

1. The topic "Immunity of State officials from foreign criminal jurisdiction" was included in the long-term programme of work of the International Law Commission at its fifty-eighth session (2006), on the basis of the proposal contained in annex A to the report of the Commission for that session (see A/61/10, para. 257 and annex A). At its fifty-ninth session (2007), the Commission decided to include the topic in its current programme of work and appointed Roman A. Kolodkin as Special Rapporteur (A/62/10, para. 376). At the same session, the Secretariat was requested to prepare a background study on the topic.[1]

2. The former Special Rapporteur submitted three reports, which were discussed by the Commission at its sixtieth (2008) session (A/CN.4/601) and its sixty-third (2011) session (A/CN.4/631 and A/CN.4/646). In the preliminary report (A/CN.4/601), the Special Rapporteur provided the background to the consideration of the question of immunity of State officials from foreign jurisdiction by the Commission and other learned institutions (paras. 6-26), outlined the preliminary range of aspects implicated by the topic (paras. 27-101) and identified issues which the Special Rapporteur viewed as worthy of consideration in determining the overall scope of the topic (paras. 102-129). In the second report (A/CN.4/631), the Special Rapporteur, following a review of developments that had taken place since the issuance of the preliminary report (paras. 6-16), provided a substantive overview and analysis of questions concerning the scope of immunity of a State official from criminal jurisdiction (paras. 17-89). In the third report (A/CN.4/646), unlike the preliminary and second reports, which addressed the substantive aspects of the topic, the Special Rapporteur considered its procedural aspects (paras. 11-57), while at the same time analysing the relationship between the invocation by a State of the immunity of its official and the responsibility of that State for a wrongful act committed for the same act which gives rise to the question of immunity (paras. 58-60). For each of three reports, the Special Rapporteur routinely presented a summary following a detailed analysis of the issues involved on the basis of a review of State practice, case law and the doctrine, thus providing elements of an overall picture of the issues addressed in a synthesized manner (A/CN.4/601, paras. 102 and 130; A/CN.4/631, paras. 90 and 91; A/CN.4/646, para. 61).

3. The International Law Commission considered the reports of the Special Rapporteur at its sixtieth and sixty-third sessions, held in 2008 and 2011, respectively. The Sixth Committee of the General Assembly dealt with the topic during its consideration of the report of the Commission, particularly in 2008 and 2011.

4. At its 3132nd meeting, on 22 May 2012, the Commission appointed Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer with the Commission. The Special Rapporteur would like to express her appreciation to Mr. Kolodkin for his devotion to the study of the topic. The scholarly and outstanding contribution of Mr. Kolodkin will undoubtedly assist the Commission in its work.

5. The present report is a "transitional report". It is preliminary in nature and must take into account the reports submitted by the former Special Rapporteur and the progress of the debates held by the competent United Nations bodies (the

[1] A/62/10, para. 386. For the Secretariat study, see A/CN.4/596 and Corr.1.

Commission and the Sixth Committee) in order to continue the work that is already under way. Therefore, the primary purpose of the present report is to help clarify the terms of the debate up to this point and to identify the principal points of contention which remain and on which the Commission may wish to continue to work in the future. The Special Rapporteur also hopes that this preliminary report will lead to a structured debate that will make it possible to meet the international community's expectations from the topic of the immunity of State officials from foreign criminal jurisdiction since 2007, when it was first included in the Commission's programme of work. For that reason, this preliminary report will identify the basic elements of the programme of work that the Special Rapporteur considers necessary to pursue in the future in order to complete work on the topic during the current quinquennium, thereby complying with the General Assembly's request that the Commission give priority to this topic in its programme of work.[2]

6. To that end, it has been decided to divide the preliminary report into four separate parts. The purpose of the first two parts will be to provide an overview of the Commission's work to date (section I), followed by a summary of the current status of the debate on the topic in the competent United Nations bodies (section II). The third part will study the major aspects of the topic which, in the Special Rapporteur's view, require special handling or consideration by the Commission in the future (section III). Lastly, the report will include an indicative programme of work, which the Special Rapporteur proposes to follow during the current quinquennium (section IV).

II. Consideration of the topic during the quinquennium 2007-2011

7. As noted above, following the inclusion of the topic in the Commission's programme of work and the appointment of the Special Rapporteur in 2007, Mr. Kolodkin submitted for the Commission's consideration three reports, which offer a broad, well-documented analysis of the question of the immunity of State officials from foreign criminal jurisdiction and present his views on the primary issues raised in that connection. On the basis of these reports, the members of the Commissions had the opportunity to formulate their opinions on various issues set out in the reports of the Special Rapporteur, as well as on general aspects of the topic. A number of States have also expressed their views on the reports of the former Special Rapporteur and on the topic in general within the framework of the Sixth Committee.

8. At these three levels, there has been significant consideration of the topic, which, in the Special Rapporteur's opinion, must be reflected in this preliminary report in order to clarify the current status of the work and of the debate on the immunity of State officials from foreign criminal jurisdiction. Therefore, these comments will be followed by three parts devoted, respectively, to the reports of Special Rapporteur Kolodkin, the debate in the International Law Commission and the debate in the Sixth Committee.

[2] Resolution 66/98 of 9 December 2011, para. 8.

A. An overview of work by the former Special Rapporteur

9. According to the former Special Rapporteur, the immunity of State officials from foreign criminal jurisdiction is grounded in international law, including customary international law. The immunity of State officials is often justified on the basis of the functional and representative theories. Moreover, principles of international law concerning the sovereign equality of States and non-interference in internal affairs, as well as the need to ensure the stability of international relations and the independent performance of their activities by States, all have a justificatory bearing on immunity.

10. Although immunity and jurisdiction are related concepts, as the International Court of Justice noted in the *Arrest Warrant* case, they are different. Absence of immunity does not imply jurisdiction and jurisdiction does not imply absence of immunity. Immunities remain opposable before the courts of a foreign State, even where such courts exercise such a jurisdiction on the basis of conventional rules.[3] In the view of Special Rapporteur Kolodkin, the consideration of immunity should be limited and should not consider the substance of the question of jurisdiction as such. It is nevertheless worth bearing in mind that the criminal jurisdiction of a State, like its entire jurisdiction over its territory, takes several forms. It may be legislative, executive or judicial, although doctrinally the executive and judicial aspects may be considered together under the rubric of executive jurisdiction. Although executive (or executive and judicial) criminal jurisdiction has features in common with civil jurisdiction, they are different in that many criminal procedure measures tend to be adopted at the pretrial phase of the juridical process. The question of immunity thus arises even at the pretrial phase of the criminal process.

11. The immunity of officials from foreign jurisdiction as a rule of international law means, in juridical terms, that the juridical right of the person enjoying immunity not to be subject to foreign jurisdiction reflects the juridical obligation of the foreign State not to exercise jurisdiction over the person concerned. Two related conclusions were drawn from this. First, immunity from criminal jurisdiction means primarily immunity only from executive (or executive and judicial) jurisdiction. Second, immunity from the criminal process or from criminal procedure measures does not imply immunity from the substantive law of the foreign State. In other words, immunity of State officials from foreign criminal jurisdiction is procedural in nature, not necessarily substantive. It serves as a procedural bar to criminal liability but does not in principle preclude it on the substance. The person in question may be proceeded with substantively in another appropriate forum.

12. In making suggestions for delimiting the scope of the topic, the Special Rapporteur noted that it covered only the immunity of officials of one State from the criminal jurisdiction of another State. It did not deal with questions concerning immunity from the civil jurisdiction of another State or international criminal jurisdiction. Nor did it address the question of immunity of an official from the State of his own nationality. The Special Rapporteur also doubted the advisability of giving further consideration within the framework of the topic to the question of recognition and the question of immunity of members of the families of high-ranking officials.

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[3] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3 at para. 59.

13. It was suggested that the topic should cover all State officials and in that regard an attempt should be made to define "State official" for the topic or to define which officials were covered by the term for the purposes of the topic.

14. The scope of the immunity from foreign criminal jurisdiction of serving officials differed depending on the level of the office held. All serving State officials enjoyed immunity in respect of acts performed in an official capacity. Only certain serving high-ranking officials additionally enjoyed immunity in respect of acts performed by them in a private capacity. The scope of immunity of former officials was identical irrespective of the level of the office which they held: they enjoy immunity in respect of acts performed by them in an official capacity during their term in office. It was suggested that the doctrinal distinction drawn between immunity *ratione personae* and immunity *ratione materiae* had been useful and remained so for analytical purposes.

15. Immunity *ratione personae* is temporal in nature and ceases once a person leaves office. It inheres to a narrow circle of high-ranking State officials, and conceivably extends during the time it is enjoyed to illegal acts performed by such officials both in an official and in a private capacity, including prior to taking office. It is not affected by the fact that the acts concerning which jurisdiction is being exercised were performed outside the scope of the functions of an official, nor by the nature of his stay abroad, including in the territory of the State exercising jurisdiction. Noting that the high-ranking officials who enjoy immunity *ratione personae* by virtue of their office include primarily Heads of State, Heads of Government and ministers for foreign affairs, the Special Rapporteur suggested that an attempt be made to determine which other high-ranking officials, beyond the "troika", enjoyed immunity *ratione personae* or to define criteria for identifying such officials.

16. A State official was protected from the criminal jurisdiction of a foreign State by immunity *ratione materiae* for acts performed by such official in an official capacity. Such immunity did not extend to acts which were performed by an official prior to taking up office. However, a former State official was protected by immunity *ratione materiae* in respect of acts performed by him during his time as an official in his capacity as an official. The classification of conduct as official conduct did not depend on the motives of the person or the substance of the conduct. Immunity *ratione materiae* extended to *ultra vires* acts of officials and to their illegal acts. The determining factor was that the official was acting in a capacity as such. The Special Rapporteur perceived the concept of "official act" to be broader and inclusive of an "act falling within official functions". The immunity was also scarcely affected by the nature of an official's or former official's stay abroad, including in the territory of the State exercising jurisdiction. Irrespective of whether such person was abroad on an official visit or was staying there in a private capacity, he enjoyed immunity from foreign criminal jurisdiction in respect of acts performed in his capacity as an official.

17. It was understood that such acts as performed were acts of the State for which the State official serves. In the view of the Special Rapporteur, this did not preclude the attribution of such acts also to the official who performed them. He suggested that there could scarcely be objective grounds for asserting that one and the same act of an official was, for the purposes of State responsibility, attributed to the State and considered to be its act, and, for the purposes of immunity from jurisdiction,

was not attributed as such and was considered to be only the act of an official. However, the scope of the immunity of a State and the scope of the immunity of its official were not identical, despite the fact that in essence the immunity was one and the same.

18. Of logical necessity, the issue of determining the nature of the conduct of an official — official or personal — and, correspondingly, of attributing or not attributing such conduct to the State, must be considered before the issue of the immunity of the official in connection with this conduct is considered.

19. Where charges (of being an alleged criminal, suspect, etc.) have been brought by a foreign jurisdiction against a State official, only such criminal procedure measures as are restrictive in character and would prevent him from discharging his functions by imposing a legal obligation on that person, may not be taken when the person enjoys (a) immunity *ratione personae* or (b) immunity *ratione materiae*, if the measures concerned are in connection with a crime committed by that person in the performance of official acts. Such measures may not be taken in respect of a State official appearing in foreign criminal proceedings as a witness when that person enjoys (a) immunity *ratione personae* or (b) immunity *ratione materiae*, if the case concerns the summoning of such a person to give testimony in respect of official acts performed by the person himself, or in respect of acts of which the official became aware as a result of discharging his official functions.

20. Criminal procedure measures by a foreign jurisdiction imposing an obligation on a State official violate the immunity which that official enjoys, irrespective of whether he is abroad or in the territory of his own State. A violation of the obligation not to take such measures against such a State official takes effect from the moment such a measure is taken by a foreign jurisdiction and not merely once the person against whom it has been taken is abroad.

21. The Special Rapporteur also considered the various interrelated rationales for possible exceptions to immunity from foreign criminal jurisdiction, chiefly advanced in respect of immunity *ratione materiae*, namely: (a) grave criminal acts committed by an official cannot under international law be considered as acts performed in an official capacity; (b) since an international crime committed by an official in an official capacity is attributed not only to the State but also to the official, then the latter is not protected by immunity *ratione materiae* in criminal proceedings; (c) peremptory norms of international law which prohibit and criminalize certain acts prevail over the norm concerning immunity and render immunity invalid when applied to such crimes; (d) there is a link between the existence of universal jurisdiction in respect of grave crimes and the invalidity of immunity as it applies to such crimes; (e) there is an analogous link between the obligation *aut dedere aut judicare* and the invalidity of immunity as it applies to crimes in respect of which such an obligation exists; (f) a norm of customary international law has emerged, providing for an exception to immunity *ratione materiae* in a case where an official has committed grave crimes under international law. The Special Rapporteur did not find any of these rationales to be sufficiently convincing. While pointing out that it was possible to establish exemptions from or exceptions to immunity through the conclusion of an international treaty, he concluded that it was difficult to speak of exceptions to immunity as a norm of customary international law that had developed. In the same way, it could not definitively be asserted that a trend towards the establishment of such a norm existed.

22. The one situation which he characterized as one of absence of immunity was where criminal jurisdiction was exercised by a State in whose territory an alleged crime had occurred, and that State had not consented to the performance in its territory of the activity which led to the crime, as well as to the presence in its territory of the foreign official who committed the alleged crime.

23. The Special Rapporteur also addressed the procedural aspects of the invocation of immunity. Given that the focus of the debate in the Commission has been on the substantive matters, for the time being, it may only be worthwhile to note his observation that the question of the immunity of a State official from foreign criminal jurisdiction must in principle be considered either at the early stage of court proceedings or even earlier at the pretrial stage, when the State that is exercising jurisdiction decides the question of taking, in respect of the official, criminal procedure measures which are precluded by immunity. Any failure to consider the issue of immunity *in limine litis* may be viewed as a violation by the forum State of its obligations under the norms governing immunity.

B. The debate in the International Law Commission

24. The Commission dealt substantively with the topic of the immunity of State officials from foreign criminal jurisdiction in 2008 (at its sixtieth session)[4] and in 2011 (at its sixty-third session).[5] Since the former Special Rapporteur did not include any draft articles in his reports, the debate among members of the Commission was always held in plenary session using an open, general format. This did not, however, prevent the members from commenting on various specific issues raised in the reports of the Special Rapporteur, including by expressing significant opinions on methodological and conceptual matters and opinions relating to the inclusion of immunity in the international legal system as a whole and its relationship to other institutions, principles and values of that system.

25. The members of the Commission generally endorsed the scope of the report proposed by the Special Rapporteur, which excluded the issues of immunity from the jurisdiction of the State of nationality of the official, immunity from international criminal courts and the immunity of officials and agents of the State, who, like diplomatic and consular officials, officials on special mission and others, are governed by ad hoc treaty rules. There was also consensus on limiting the topic to immunity from criminal jurisdiction, excluding the immunity of State officials from civil jurisdiction.

26. The members of the Commission were generally in favour of viewing immunity as an institution grounded in customary international law, as the Special Rapporteur had proposed in his preliminary report.

27. There was an interesting debate on the basis for immunity, during which some members of the Commission noted that immunity was justified by the function performed while others focused instead on the representative nature of State

[4] A/63/10, paras. 279-299. The Commission considered the topic at its 2,982nd to 2,987th meetings. See A/CN.4/SR.2982 to A/CN.4/SR.2987.

[5] A/66/10, paras. 116 to 140 and 159 to 185. The Commission considered the topic at its 3,086th to 3,088th, 3,111th and 3,113th to 3,115th meetings. See A/CN.4/SR.3086 to SR.3088, SR.3111 and SR.3113 to SR.3115.

officials and, ultimately, on the "personification" of the State in those officials as the justification for immunity. Some members, supporting the essentially functional nature of immunity, stressed that a *stricto sensu*, restrictive interpretation of it was therefore required. It must be borne in mind that the statements made by the members of the Commission who spoke on the topic did not make a sufficient distinction between the application of the two bases (functional and representative) for immunity *ratione personae* and immunity *ratione materiae*.

28. Some members of the Commission supported the Special Rapporteur's position that immunity was grounded in the sovereign equality of States and stability in international relations. However, other members drew attention to the fact that immunity also placed a limitation on the sovereignty of the forum State insofar as it prevented the exercise of the latter's jurisdiction.

29. Lastly, some members of the Commission expressed concern at the fact that in establishing the basis and nature of immunity, the Special Rapporteur had not taken sufficient account of new aspects of international law, related to the effort to combat impunity, which reflected a tendency to limit immunities and their scope.

30. There was broad support for the idea that immunity was procedural, not substantive, in nature, as the Special Rapporteur had maintained in his reports. However, some members of the Commission were in favour of addressing the topic of immunity from a substantive perspective as well.

31. Generally speaking, the members of the Commission endorsed the distinction between immunity *ratione personae* and immunity *ratione materiae*, although no explicit opinions on the implications of such a distinction were expressed.

32. Concerning the persons to whom immunity would apply, there was a short debate on the use of the terms "official", "agent" and "representative". However, the debate on the question of which term should be used was inconclusive. In any event, some members of the Commission agreed with the Special Rapporteur that all State officials enjoyed immunity by virtue of their office. Other members, however, drew attention to the need to define the term "official" and to limit it to persons involved in the exercise of governmental authority or in public service.

33. Concerning the persons who enjoyed immunity *ratione personae*, many of the Commission's members expressed support for the inclusion in this category of members of the so-called "troika": Heads of State, Heads of Government and ministers for foreign affairs. However, some members questioned the appropriateness of extending such immunity to include ministers for foreign affairs. Other members were in favour of including in this category other high-level officials (such as ministers of defence and ministers of trade) who are quite often involved in international affairs. Attention was also drawn to the possibility of establishing criteria for determining which high-level officials of States, other than the "troika", might enjoy such immunity, but other members of the Commission were of the view that only the "troika" enjoyed immunity.

34. With respect to the scope of immunity and the identification of any exceptions to it, some members of the Commission considered that immunity was absolute; they shared the Special Rapporteur's view that none of the customary justifications could justify any kind of exception to immunity. Other members, however, thought that it was necessary to take into account certain circumstances under which immunity would not apply, such as accusations arising from non-official acts,

competing *jus cogens* norms in respect of international crimes, or the commission of international crimes that are condemned by the international community as a whole. Still other members of the Commission said that competing *jus cogens* norms and the existence of international crimes were irrelevant for purposes of immunity. In that context, some members recalled that the definition of the scope of immunity must make provision for international crimes for two reasons: the prior work of the Commission in connection with the draft code of crimes against the peace and security of mankind, and the fact that there was no immunity from prosecution by the international criminal courts.

35. The members of the Commission also expressed their views concerning the concept of an "official act" from the point of view of its scope and of its relationship to the international responsibility of States. Some members considered that any act that had been, or appeared to have been, carried out by an "official" must be defined as an official act for which immunity was enjoyed. However, other members supported a restrictive definition of an "official act", excluding conduct that might, for example, constitute an international crime. Some members were in favour of treating the concept of an "official act" differently depending on whether the act was attributed to the State in the context of responsibility or to individuals in the context of criminal responsibility and immunity.

36. There was less discussion of the procedural issues covered in the third report of the Special Rapporteur (A/CN.4/646). Most of the Commission's members endorsed the general approach taken by the Special Rapporteur in this area (invocation of immunity, timing and form of invocation of immunity, waiver of immunity, etc.), although some members expressed reservations, arguing that agreement on the substantive issues raised in the second report of the Special Rapporteur must be reached before the procedural aspects of immunity were addressed.

37. Lastly, with respect to the approach to be taken by the Commission in its work on the topic, its members expressed various opinions during the debate as to whether the topic should be addressed solely in terms of *lex lata*, or whether an analysis of *lex ferenda* should also be included. There were also differences of opinion as to whether the topic should be viewed as an exercise in codification or whether the element of progressive development should be included. Some members of the Commission, arguing for a cautious approach, were in favour of beginning with a study of *lex lata* owing to the highly sensitive nature of the topic. Other members stressed that in any event, the Commission's approach to the topic must be balanced in order to weigh the principle of immunity against the need to combat impunity.

C. The debate in the Sixth Committee of the General Assembly

38. The Sixth Committee dealt substantively with the topic of the immunity of State officials from foreign criminal jurisdiction at the sixty-third (2008)[6] and sixty-sixth (2011)[7] sessions of the General Assembly. Statements by delegations also offer points of interest that clarify States' views concerning the reports of the former Special Rapporteur, and immunity in general.

[6] See A/CN.4/606, paras. 89 to 110. See also the following summary records of the Sixth Committee of the General Assembly: A/C.6/63/SR.22 to SR.25.

[7] See A/CN.4/650, paras. 4 to 13. See also the following summary records of the Sixth Committee of the General Assembly: A/C.6/66/SR.18 to SR.20, SR.24 and SR.26 to SR.28.

39. States did not comment specifically on the scope of the topic proposed by the Special Rapporteur, although some delegations said that it would be useful to take into account certain matters related to the principle of universal jurisdiction or to the establishment of international courts. Others suggested that the question of the inviolability of State officials, which was closely linked to immunity, should also be included.

40. One delegation expressly stated that the legal basis of immunity was customary international law.

41. A number of delegations supported a functional rationale for immunity, while another group of delegations considered that its rationale was both functional and representative. Some delegations stated that sovereignty was the basis for immunity and one delegation maintained that the ultimate purpose of immunity was to preserve the dignity of the State. Some delegations also spoke of the need to preserve stability in relations between States and to protect States' ability to perform their functions, noting that those interests must be carefully balanced with the prevention of immunity.

42. There was support for the essentially procedural nature of immunity. Some delegations noted that immunity did not relieve officials of the general responsibility to respect the laws of the foreign State or absolve them from accountability for their acts before foreign courts.

43. There was also support for distinguishing between immunity *ratione personae* and immunity *ratione materiae* in establishing the scope of the immunity of State officials. Generally speaking, there was no opposition to maintaining this distinction.

44. Another point on which there was no consensus in the Sixth Committee was the question of which persons enjoyed immunity. There was general agreement as to the immunity *ratione personae* of the "troika", but one delegation also asked the Commission to consider whether this type of immunity also applied to other individuals owing to the high-level offices that they occupied. In that connection, one delegation stated that immunity *ratione personae* should apply only to persons who held representative posts. Opinions on the question of whether general immunity applied to all State officials varied widely and the Commission was requested to define the term "official".

45. There were diverging views concerning the scope of immunity. While some argued that immunity was absolute in every case and that no exceptions could be found in customary law, others maintained that immunity was a general rule to which there could be exceptions. In that connection, some were in favour of using serious international crimes as a criterion for identifying exceptions to immunity, including immunity *ratione personae*, and the Commission was asked to examine this issue from a *lex ferenda* perspective. Similarly, peremptory norms were mentioned as potential grounds for exception, as were crimes that fall within the jurisdiction of international courts and offences that are criminalized under domestic law pursuant to the Rome Statute. On the other hand, one delegation said that exceptions to immunity could undermine international relations, give rise to politically motivated indictments and even raise due process concerns. In any event, some delegations warned that caution was necessary in addressing the issue of exceptions to immunity.

46. Some delegations also said that the Commission must establish an explicit definition of an "official act" that distinguished clearly between an "act of an official" and an "act falling within official functions".

47. The issue of the relationship between immunity and the responsibility of the State was also raised. One delegation noted that in order to address this link properly, the concept of "control" in the context of immunity *ratione materiae* would have to be clarified.

48. Lastly, with respect to the approach to the topic that the Commission should take, a wide range of views concerning the role to be played by a study *de lege lata* or *de lege ferenda* were expressed in the Committee. Some delegations recommended a step-by-step approach whereby the Commission would first address the topic first *de lege lata* and then *de lege ferenda*. Others said that the Commission should take new approaches since international law was evolving and the resulting changes, particularly in connection with international crimes, must be taken into account. In that regard, the Commission was requested to promote greater consistency in international law and to strike a balance between the need to preserve stability in international relations and the need to avoid impunity for serious crimes of international law.

III. The topic "immunity of State officials from foreign criminal jurisdiction" during the present quinquennium: issues to be considered

49. The topic of the immunity of State officials from foreign criminal jurisdiction remains of great interest to States and to the international community as a whole since practice, while consistent, has been controversial. States have been debating this type of immunity in both political and legal forums for several decades, and academic and scientific institutions and think tanks in various parts of the world — including, in particular, the Institute of International Law[8] — have made important contributions to this debate and continue to do so. The debate has also been enriched by the inclusion of several categories that are essential elements of contemporary international law, such as the definition of the international criminal responsibility of individuals, the establishment of the international criminal courts and, generally speaking, the development of appropriate mechanisms for combating immunity for the most serious international crimes. Lastly, it must not be forgotten that the International Court of Justice has made an important contribution to the debate through various cases that are quite well known and have been studied by the former Special Rapporteur, including the Court's recent judgment of 3 February 2012 in *Jurisdictional Immunities of the State: Germany v. Italy: Greece intervening*.[9] This judgment deserves special consideration because some of its methodological elements are of interest in the context of the immunity of States, whose potential implications for the immunity of State officials from foreign criminal jurisdiction the Commission should consider.

[8] See the interesting study of the work of the Institute by Special Rapporteur Kolodkin in his preliminary report (A/CN.4/601, sect. III (B)) and the references to the Institute's most recent resolutions in his reports.

[9] Attention should be drawn to the separate opinions of Judges Koroma, Keith and Bennouna and to the dissenting opinions of Judges Cançado Trindade and Yusuf and of then Judge ad hoc Gaja.

50. Furthermore, as is clear from the overview contained in section II of this preliminary report, the topic of the immunity of State officials from foreign criminal jurisdiction is not without controversy. On the contrary, the views expressed by Special Rapporteur Kolodkin in his three reports have given rise to an extensive and interesting debate in which different and, in many cases, opposing positions on some of the basic concepts and categories proposed in these reports can be identified.

51. Within that framework, the Commission must continue its work on this topic and must do so in a systematic, structured manner in order to ensure that the topic is addressed effectively and efficiently. This requires an additional attempt at clarification, both methodological and conceptual, with two objectives: first, to eliminate as many as possible of the "gray areas" that could cause confusion on a topic in need of rapid, adequate clarification; and, second, to draw up a road map that will make it possible to comply, as reliably as possible, with the General Assembly's request that the Commission give priority to the topic.

52. At the current stage of the work, this attempt at conceptual and methodological clarification must take the form of identification of the principal points of contention that currently exist and of those that will have an impact on the future work of the Special Rapporteur and the Commission.

53. Therefore, the following pages will address, in turn, the following issues: the distinction and the relationship between immunity *ratione materiae* and immunity *ratione personae* and the basis for both categories in order to determine whether each of them should be the subject of a separate legal regime (section A); the distinction and the relationship between the international responsibility of the State and the international responsibility of individuals and their implications for immunity (section B); immunity *ratione personae* (section C); immunity *ratione materiae* (section D); and, lastly, mention of the procedural issues related to immunity (section E).

A. Immunity *ratione personae* and immunity *ratione materiae*

54. In his preliminary report, Special Rapporteur Kolodkin recognized the distinction between immunity *ratione personae* and immunity *ratione materiae*. In so doing, he echoed a classic distinction that is reflected in both practice and doctrine. This distinction between the two types of immunity has also been reflected in the Commission's debates and in those of the Sixth Committee. It is unquestionably a distinction that exists in practice, and its continued existence appears to constitute one of the rare points of contention that have emerged to date.

55. However, there appears to be consensus only on the existence of this distinction; it has been impossible to develop a uniform or essentially uniform position on two questions that are essential in mapping the future work of the Commission in this area: (a) whether the conceptual distinction between immunity *ratione personae* and immunity *ratione materiae* requires, or should require, two separate legal regimes; and (b) whether, despite this conceptual distinction, there are basic elements that imply the existence of a certain unity regarding the immunity of State officials from foreign criminal jurisdiction.

56. Concerning the first of these questions, a distinction between immunity *ratione personae* and immunity *ratione materiae* may be considered the most appropriate methodological approach to the topic since it makes it possible to give separate

treatment to the intrinsic, specific circumstances in which each of these types of immunity functions. It will also help to avoid confusion and gray areas, which, in practice, are nevertheless emerging more frequently than might be wished, including in the areas of jurisprudence and doctrine. Lastly, it will make it possible to give separate treatment to the legal regimes to be applied in each case. The Commission may wish to follow this methodological proposal to make a clear distinction between the two types of immunity and, at the same time, to establish a separate legal regime for each of them. This methodological approach is made all the more necessary by the fact that the previous studies do not facilitate such a clear distinction.

57. With respect to the second question, it must be stressed that the distinction between the two types of immunity of State officials from foreign criminal jurisdiction (*ratione personae* and *ratione materiae*) must be made without prejudice to one point on which there is no disagreement whatever: that the two types of immunity have the same purpose, namely, to preserve principles, values and interests of the international community as a whole; they are not granted to the beneficiary in abstract terms, independently from his or her relationship to the State or performance of representative or other functions thereof; and they are granted with a view to the continued performance of such functions and to stability in international relations. Therefore, regardless of the other specific functions of each of these types of immunity, the immunity of State officials from foreign criminal jurisdiction, taken as a whole, has a clearly functional nature that is linked to preservation of the principles and values of the international community, a functional nature of general scope that cannot be reduced solely to immunity from jurisdiction *ratione materiae* even though the term "functional immunity" tends to be used only for this type of immunity.

58. This functional nature of immunity, understood broadly, is the cornerstone of immunity and, in the Special Rapporteur's view, must therefore be a key element of the Commission's work on the topic. Only by taking this aspect into consideration will it be possible to understand, and to help lay a firm foundation for, a system of immunity of State officials from foreign criminal jurisdiction that can be incorporated seamlessly into contemporary international law, thereby ensuring that such immunity does not conflict unnecessarily with other principles and values of the international community that are also in the process of incorporation into international law. This will make it possible to take a balanced approach to the institution of immunity that is the subject of the present report, thereby facilitating the establishment of one or more legal regimes that will provide security in practice and in international relations.

B. The international responsibility of the State and the international responsibility of individuals: implications for immunity

59. A second issue that has been a subject of debate in previous sessions is the relationship between the international responsibility of the State and the international responsibility of individuals and its potential implications for the immunity of State officials from foreign jurisdiction. The debate arose, essentially, in defining the concept of an "official act" and its attribution to the State. Consequently, this is a debate that has taken place particularly with reference to immunity *ratione materiae*, but which also concerns immunity *ratione personae* to the extent that the latter also covers immunity in respect of official acts.

60. It is essential to clarify this relationship in order to determine the methodological approach to immunity; it will also have major consequences for the legal regime or regimes applicable to the two types of immunity. As a result, the Commission might wish to address this issue in the early stages of its work during the present quinquennium. The norms and principles of international law that are particularly applicable to immunity and to the responsibility of the State, as well as the other norms and principles of contemporary international law that are applicable to the international criminal responsibility of individuals and that constitute a set of norms, principles and values of the international community in the effort to combat impunity, should therefore be taken into account.

C. Immunity *ratione personae*

61. As mentioned above, the concept of immunity *ratione personae* is not a point of contention since it is generally agreed that it refers to the immunity enjoyed by certain persons, who are identified individually owing to their specific State office, with respect both to their private acts and to official acts arising from the office that they hold. This office, as well as the functions inherent in it, would explain the recognition of immunity before the criminal courts of a foreign State. However, while the concept of immunity *ratione personae* is not, in itself, controversial, the definition of its characteristics is a matter for discussion on which it has not, as yet, been possible to reach consensus. This is reflected in the reports of the former Special Rapporteur and, in particular, in the debate in the Commission and in the General Assembly.

62. Thus, all that can be concluded is that there is agreement on three basic points: that immunity *ratione personae* is associated with the holding of extremely high State office (although there is insufficient consensus on which holders of such office are included); it covers all acts performed by the beneficiary (both private and official); and it is temporary in nature since immunity *ratione personae* ends at the moment when the person ceases to hold the office that conferred immunity. However, there are still points of contention, particularly with regard to two key issues: the list of persons who could enjoy immunity *ratione personae*, and the question of whether immunity is absolute or restricted. These two issues should therefore be the focus of the Commission's future work on the topic.

63. Concerning the first issue, State practice, doctrine and jurisprudence appear to point to an emerging consensus on the "troika" (the Head of State, the Head of Government and the Minister for Foreign Affairs), each of which invariably enjoys immunity. Some have argued that other persons and/or offices might also enjoy immunity, but it has not been possible to reach any kind of consensus on those persons and/or offices. The Commission might therefore find it useful to study both practice and the applicable principles of international law in order to answer three separate but complementary questions. Is it possible that immunity from foreign criminal jurisdiction could cover persons other than the members of the "troika"? If so, which persons/offices other than the "troika" should enjoy immunity or, at the least, what criteria could be used to identify them? And, lastly, should the list of those who enjoy immunity be closed or open?

64. With respect to the absolute or restricted nature of immunity *ratione personae*, two opposing positions have been expressed to date. For some, there are no

exceptions to this type of immunity, which is therefore opposable to any act carried out by the persons enjoying immunity. For others, on the contrary, certain acts performed by a Head of State, Head of Government, Minister for Foreign Affairs or, where appropriate, any other person who might potentially enjoy immunity would not be covered if the act was contrary to *jus cogens* norms or could be characterized as an international crime. The Commission may find it useful to address this issue, taking the following elements, among others, into account: the very specific position of those who enjoy immunity in the State system, and in the entire system of international relations; the interests, values and principles of international law that are at stake; the functional nature of all immunity and the particular nature of this type of immunity; and, lastly, whether a potential principle of restrictive interpretation is applicable to the institution of immunity.

D. Immunity *ratione materiae*

65. The concept of immunity *ratione materiae* is also not, in the abstract, a point of contention. In the previous work of the Commission and in practice, jurisprudence and doctrine, this term refers to the immunity enjoyed by certain persons who act as official or agents of the State and whose official acts are performed in that capacity. However, some of the integral aspects of this concept have been the subject of various and opposing interpretations that are an obstacle to potential consensus on the definition of immunity *ratione materiae*. At the same time, the debates in the Commission and in the Sixth Committee have raised other points of contention that must be addressed if a legal regime applicable to this type of immunity is to be established. The aforementioned contention concerns, primarily, the following issues: (a) the definition of the subjective scope of immunity *ratione personae*, which Special Rapporteur Kolodkin linked to the general concept of the "official"; (b) the definition of an "official act" and its relationship to State responsibility; and (c) the absolute or restricted nature of immunity.

66. With regard to the first of these issues, it must be stressed that the terminology employed by Special Rapporteur Kolodkin in referring to the persons who enjoy immunity introduced an element of ambiguity that must be resolved. For example, the term "official" ("*funcionario*" in Spanish and "*fonctionnaire*" in French) does not necessarily refer to a single general category of persons in the service of the State since national legal regimes vary widely. The Commission might therefore reconsider the possibility of using a term that better reflects the subjective reality that is the basis for immunity *ratione materiae*.

67. On the second point, the definition of an "official act" has also been hotly debated with regard both to the concept itself and to its implications for immunity. In particular, the Commission may find it useful to distinguish between official acts and unlawful acts; between official acts and the attribution of an act to the State; and between the responsibility of the State and the criminal responsibility of individuals, both of which may arise from the same official act. In defining the term "official act", practice, the applicable principles of international law and the current values of the international community must be taken into account. Lastly, the question of whether restrictive interpretation criteria apply to this type of immunity must also be considered.

68. Lastly, there is insufficient consensus on the question of whether there are exceptions to this type of immunity, particularly in cases involving the violation of *jus cogens* norms or the commission of international crimes. The same question arises as in the aforementioned case of immunity *ratione personae*; however, it should be noted that there appears to have been greater support for a potential exception in the case of immunity *ratione materiae* than in that of immunity *ratione personae*. In any event, the Commission should examine this issue on the basis of the same parameters that have been mentioned above in relation to immunity *ratione personae*, taking also into account the question of whether the differences between these two types of immunity come into play.

E. Procedural aspects of immunity

69. By its very nature, the effective exercise of foreign criminal jurisdiction over State officials occurs in the context of judicial proceedings. The question of its applicability during a prior and, to some extent, essentially preparatory phase of those proceedings may also be raised. Therefore, the procedural aspects of immunity are an essential and unavoidable element of work on the topic. Special Rapporteur Kolodkin devoted his third report (A/CN.4/646) to these issues. While that report was not discussed extensively by the Commission, issues relating to the form of invocation of immunity, the timing of its invocation and the potential waiver of immunity, among others, were considered less controversial than the substantive issues addressed in the present report.

70. The Special Rapporteur therefore considers that this last set of questions should ultimately be the subject of specific study in order to determine whether, among other options, it would be possible to establish a single procedural regime that would include both immunity *ratione personae* and immunity *ratione materiae* or whether the specific characteristics of these two categories will require the establishment of different procedural rules for each of them. This does not mean, however, that certain procedural aspects should be ignored in addressing the substantive issues mentioned above since the essentially procedural nature of immunity makes this necessary.

IV. Workplan

71. The future work of the Commission cannot and should not ignore its previous work. However, owing to the methodological considerations set out above, the Special Rapporteur is of the view that a new workplan for the next quinquennium should be established.

72. This workplan should focus on the points of contention mentioned above and should address them in a systematic, ordered and structured manner. To that end, the Special Rapporteur considers it useful to divide these issues into four groups:

1. General issues of a methodological and conceptual nature

   1.1 The distinction between immunity *ratione materiae* and immunity *ratione personae* and the implications of that distinction

   1.2 Immunity in the system of values and principles of contemporary international law

1.3 The relationship between immunity, on the one hand, and the responsibility of States and the criminal responsibility of individuals, on the other

2. Immunity *ratione personae*

2.1 The persons who enjoy immunity

2.2 The material scope of immunity: private acts and official acts

2.3 The absolute or restricted nature of immunity and, in particular, the role that international crimes play or should play

3. Immunity *ratione materiae*

3.1 The persons who enjoy immunity: the remaining terminological controversy and the definition of an "official"

3.2 The definition of an "official act" and its relationship to the responsibility of the State

3.3 The absolute or restricted nature of immunity: exceptions and international crimes

4. Procedural aspects of immunity

73. The Special Rapporteur has already held one set of informal consultations with the members of the Commission, on 30 May 2012. The following list of questions were submitted to the members for consideration during those consultations and should be read jointly with the sets of questions set out above since they refer to and elaborate upon some of them:

Some methodological and general conceptual issues

- What is the legal and sociological basis of the immunity of State officials from foreign criminal jurisdiction?
- Could immunity serve as an instrument for the protection and guarantor of some principles and values of the international community?
- Should those principles and values be balanced with other principles and values of the international community?
- What is the place for the functional approach to immunity?
- Is it useful to approach the topic by retaining the distinction between immunity *ratione personae* and immunity *ratione materiae*?
- What should be the consequences of such an approach? Two different legal regimes?
- Should the link between State responsibility and individual responsibility be present in the approach of the topic? If yes, what should be this link?
- Is the substance/procedure distinction useful in addressing the topic?

Immunity ratione personae

- Persons entitled to immunity: a narrow or a broad approach? Closed list or open list?

- **Scope of immunity: an equal or a different treatment of private acts and official acts?**
- **Could there be a place for international crimes in the approach to immunity *ratione personae*?**

***Immunity* ratione materiae**

- **A terminological issue: are the words "official", "fonctionnaire" and "funcionario" the most accurate words with regard to the description of persons entitled to immunity?**
- **The concept of "official act": a narrow or a broad approach? What link with State responsibility?**
- **Could there be a place for exceptions, in general terms, with regard to immunity *ratione materiae*? If yes, which exceptions?**
- **Could there be a place for international crimes in the approach to immunity *ratione materiae*?**

74. For each of these questions, and for others that will need to be addressed in connection with them, the Special Rapporteur proposes to prepare draft articles which will be submitted progressively to the Commission. It would be premature to make any proposal concerning the final form that the outcome of this work should take, although the normative aspect of the topic cannot be ignored.

75. Concerning the method of work that the Special Rapporteur proposes to follow in addressing the remaining issues, the Commission's attention is drawn to the fact that a step-by-step approach, addressing each of the various groups of remaining questions in turn, is considered the most appropriate. The Special Rapporteur is convinced that this method, which makes it possible to isolate the issues in need of consideration, will make it easier to structure a debate that has the disadvantage of focusing on issues that are numerous and, moreover, sensitive and extremely complex. Such an approach is likely to lead to concrete results more quickly.

76. The Special Rapporteur also considers it essential to continue to make a detailed study of practice in the broad sense of the word. To that end, she will continue to use the memorandum prepared by the Secretariat in 2009 (A/CN.5/596 and Corr.1) while including subsequent practice that was not covered by the former Special Rapporteur in his three reports.

77. Lastly, as to whether to approach the topic from the perspective of *lex lata* or *lex ferenda*, the Special Rapporteur would like to state that in her opinion, the topic of the immunity of State officials from foreign criminal jurisdiction cannot be addressed through only one of these approaches. She believes that, on the contrary, both aspects must be taken into account in the future work of the Commission although she fully realizes the usefulness of beginning with *lex lata* considerations and including an analysis *de lege ferenda* of some topics, as needed, at a later date. This approach will make it possible to address the topic in a balanced manner, and it is fully consistent with the Commission's mandate to pursue simultaneously the codification and progressive development of international law.